IN THE SUPREME COURT OF THE UNITED STATES

_____ TERM, 1974

NO. 74-5116

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SUPREME COURT, U.S.

JACK ROLAND MURPHY,

Petitioner,

vs.

STATE OF FLORIDA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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10

I N D E X

OPINION BELOW	1
JURISDICTION	1-2
QUESTIONS PRESENTED	2
CONSTITUTIONAL PROVISIONS INVOLVED	3
STATEMENT OF THE CASE	3-7
REASONS FOR GRANTING THE WRIT	7-19
CONCLUSION	19
APPENDIX	A-D
CERTIFICATE OF SERVICE	20

TABLE OF AUTHORITIES

CASES	PAGE
Davis v. United States, 413 F. 2d 1226, (5Cir.1969)	8,14
Duncan v. State of Louisiana, (1968) 391 U.S. 145, 88 S.Ct. 144	14
Irvin v. Dowd, 1961, 366 U.S. 717, 81 S.Ct. 1639, 6 L.Ed.2d 751	9,10
Marshall v. United States, 1959, 360 U.S. 310, 79 S.Ct. 1171, 3 L.Ed.2d 1250	8,9,10
People v. Gitlow, 234 N.Y. 132, 158 (1922)	13
Rideau v. Louisiana, 1963, 373 U.S. 723, 83 S.Ct. 1417, 10 L.Ed.2d 663	10
Sheppard v. Maxwell, 1966, 384 U.S. 333, 86 S.Ct.1507, 16 L.Ed.2d 600	10,11,15,16
United States ex rel. Bloeth v. Denno, 313 F.2d 364 (2 Cir. 1963)	17
United States, ex rel. Doggett v. Yeager, 472 F.2d 229 (3 Cir. 1973)	11,12
United States v. Isaacs, 351 F.Supp. 1323 (1972)	12

CASE	PAGE
United States v. Stallings, 437 F. 2d 1057 (5 Cir. 1971)	8

CONSTITUTIONAL PROVISION

Constitution, United States, Amendment XIV	3

TEXT BOOKS

Florida Rules of Evidence. §99	8

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JACK ROLAND MURPHY,

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vs.

THE STATE OF FLORIDA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

The Petitioner, JACK ROLAND MURPHY, prays that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit entered on June 10, 1974, Petition for Rehearing denied July 12, 1974.

OPINION BELOW

The opinion of the United States Court of Appeals for the Fifth Circuit is reported at _____F. 2d_____(Appellate Number 73-3528, Reported June 10, 1974) and is attached hereto as Appendix A. The Order denying Petition for Rehearing dated July 12, 1974 is attached hereto as Appendix B.

JURISDICTION

The Judgment of the United States Court of Appeals for the Fifth Circuit was made and entered on June 10, 1974, and a copy thereof is appended to this Petition in Appendix A. The Order of the United States Court of Appeals for the Fifth Circuit denying a Petition for Rehearing was made and entered on July 12, 1974, and a copy thereof is appended to this Petition in Appendix B. The jurisdiction of this Court is

1

invoked under Title 28 U.S.C. 1254 (1), and Rule 19, United States Supreme Court Rules. The Judgment of the United States Court of Appeals for the Fifth Circuit and the Order denying the Petition for Rehearing are (a) in conflict with the decision of another court of appeals on substantially the same matter; and (b) a decision on an important question of Federal law which has not been, but should be, ultimately settled by this Court. Therefore, the jurisdiction of this Court is invoked.

QUESTIONS PRESENTED

1. Whether, the Petitioner, was denied due process and equal protection of the laws in violation of the Fourteenth Amendment to the Constitution of the United States because of the state trial court's failure to grant Petitioner's pretrial motion for a change of venue, or to exclude certain prospective jurors because:

(A) All of the prospective jurors examined had obtained knowledge from the news media prior to their examination in Court that the Petitioner had been previously convicted of either, breaking and entering or murder in the first degree.

(B) All of the prospective jurors had been subjected to extensive news media coverage for more than three years, concerning not only the facts of the case which is now before this Court, but also facts surrounding two murders which occured shortly before this case and several publicized local and state investigations dealing with Petitioner's being released on bond and with a ruling by the trial Court declaring Petitioner incompetent or insane.

2

CONSTITUTIONAL PROVISIONS INVOLVED

UNITED STATES CONSTITUTION
FOURTEENTH AMENDMENT

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

The Petitioner, along with Robert Greenwood and Paul Gagnon were charged with the robbery of Mrs. Olive Wofford, a wealthy resident of Miami Beach, which occurred Sunday, January 28, 1968. The case was originally filed as Case Number 68-530 in the Criminal Court of Record in and for Dade County, Florida. During the pendency of that case, Petitioner filed a Motion for Change of Venue because of the excessive prejudicial publicity surrounding the case itself as well as the Petitioner's previous background. Prior to the trial in that case, the Petitioner was arrested for the double murder of Terry Rae Kent Frank and Annalie Mohn. These killings became notorious in the press as the "Whiskey Creek Murders".

During the pretrial proceedings in the Wofford robbery case, the Petitioner was initially admitted to bail. This caused excessive news coverage and community cries for grand jury and other state investigations. Thereafter, the

Defendant was declared incompetent to stand trial by the trial court judge. This ruling also received substantial attention in the news media and several state and county criminal investigations were begun over said controversial ruling. Because of the trial court's ruling declaring the Petitioner incompetent to stand trial, Richard Gerstein, the State Attorney for Dade County, voluntarily nolle prossed the Wofford robbery case, to wit: 68-530, so that the trial court would no longer have jurisdiction over the Defendant and he could be brought to trial in Broward County for the notorious "Whiskey Creek Murders."

On August 14, 1968, the Defendant along with Alan Kuhn, Jack Griffith and Robert Greenwood were indicted in Case Number 68-360 CR-JE, with conspiring to transport stolen securities from Los Angeles, California to Miami Beach, Florida. Said case was closely related to the "Whiskey Creek Murder case."

On March 1, 1969, the Defendant was found guilty of the murder of Terry Rae Kent Frank. On August 25, 1969 the Dade County State Attorney refiled the Wofford robbery charges against Petitioner, which case number was 69-7464, and which is the subject matter of this Petition.

Thereafter, in December of 1969, the Defendant plead guilty to Count I of the Federal Indictment in Case Number 68-360 CR-JE. On July 17, 1970, the Defendant filed a Motion for Change of Venue in the second Wofford robbery case. The state trial court deferred ruling on the motion until after an attempt was made to select a jury.

On August 27, 1970 the jury selection began. Of the 78 jurors questioned, the Defendant excused 12 preemptorily, 27 were excused for either medical, family or economic reasons; 3 were excused for various other reasons; 20 were excused because they had formed an opinion via the news media that the Petitioner was guilty and they could not give the Petitioner a fair trial. State preemptorily excused 8 jurors. Of the 8 jurors selected, none of whom were acceptable to the Petitioner their knowledge of the Petitioner, his background and the case in question, is as follows:

1. Five of the eight jurors stated that the jury panel had been discussing the Petitioner and the case and many had formed an opinion that the Petitioner was guilty.

2. Six of the eight jurors knew that the Petitioner had been a Defendant in the "Whiskey Creek Murder Case" and was found guilty of first degree murder.

3. Six of the eight jurors knew that Petitioner had been a defendant in the theft of the "Star of India and Delong Ruby" from a New York museum.

4. All of the jurors knew that the Petitioner was a convicted felon and was serving time for murder, or had served time for being involved in jewel thefts.

5. All of the jurors stated that their knowledge of the Defendant came from various parts of the news media, i.e., radio, television, newspapers, etc.

6. Four of the eight jurors testified that they had been reading the various articles in the newspapers printed during the week of jury selection.

7. Four of the eight jurors were familiar with prior rulings of the Court concerning the controversial ruling over Petitioner's competency to stand trial.

8. Many of the jurors questioned stated that the prospective jury panel had been discussing the case between themselves and many had formed an opinion that the Petitioner was guilty.

After the jury was selected, but prior to their being sworn, Petitioner renewed his Motion for Change of Venue on the basis that the jurors, although they gave assurances of being impartial, could not do so because of their knowledge of the case and their knowledge of Petitioner's past criminal conduct and convictions. The motion was also renewed on the basis that jurors who had knowledge of Petitioner's prior criminal record should not be permitted to sit as jurors and should be excused. During this part of the argument, Petitioner introduced the following exhibits into evidence in support of the motions:

1. Defendant's Exhibit "F" which was an Order dated July 8, 1968, removing the trial of the co-defendants in the Wofford robbery case to another county because of the Court's failure to control publicity surrounding the case.

2. Defendant's Exhibit "G" which was a hearing on a Motion to Change Venue in the United States District Court for the Southern District of Florida, Case Number 68-360 dated March 6, 1969.

3. Defendant's Exhibit "H" entitled "Order of Transfer" wherein the United States District Court, on April 21, 1970, transferred Case Number 68-360 to Pensacola, Florida for trial.

Notwithstanding all of the exhibits and the difficulty in selecting an impartial jury, the state trial Court denied the motion to change venue as well as the motion to exclude those jurors with knowledge of the Petitioner's past criminal record.

After a jury trial, the jury returned a verdict finding the Petitioner guilty of Count I, to wit: Breaking and entering a dwelling with intent to commit a felony, to wit: Robbery and guilty of Count II, to wit: Assault with intent to commit a felony, to wit: Robbery. The Court thereafter adjudged the Petitoner guilty on both counts. On Count I the Petitioner was sentenced to life in prison, on Count II the Petitioner was sentenced to twenty (20) years, said sentence to run consecutive to the sentence in Count I.

Thereafter the Defendant appealed to the District Court of Appeals of Florida, Third District. Court affirmed the judgments and convictions which opinion is recorded in 252 So. 2d 385 (Fla. Appeals 1971). A copy of said opinion is attached hereto as Exhibit "C".

Thereafter Defendant filed a Petition for Writ of Habeas Corpus in the United States District Court, Southern District of Florida. That Court's opinion is found at 363 F. Supp. 1224, (S. D. Fla. 1973) and is attached hereto as Appendix D.

REASONS FOR GRANTING THE WRIT

The decision below should be reviewed by this Court for the following reasons:

I

A. PRETRIAL PUBLICITY CONCERNING PETITIONER'S PAST CRIMINAL RECORD

Most of the prospective jurors questioned, and all of the jurors who sat on the case, knew that the Petitioner had been convicted of either a jewel theft, murder, or possession of stolen securities; and that Petitioner was in fact presently incarcerated in Raiford State Prison.

It is clear, under both Florida and Federal law, that the only proper way of introducing prior convictions is in an attempt to impeach or discredit the defendant's character, should he offer evidence in his own behalf at the time of trial. See Davis v. United States, 413 F. 2nd 1226, (5 Cir. 1969), United States v. Stallings, 437 F. 2d 1057 (5 Cir. 1971) and Fla. R. Evid. §99 (1967).

In Marshall v. United States, 360 U.S. 310, 79 S. Ct. 1171 (1959) a case recognized by both the Federal District Court in its opinion and the Fifth Circuit Court of Appeals as being a case factually identical to the case at bar, the Defendant was charged with unlicensed dispensing of drugs. During the trial defendant never took the witness stand. Also during the trial, newspaper articles containing information about the defendant's past criminal record reached members of the jury. In reversing the conviction, the Court stated:

> "... we have the exposure of jurors to information of a character which the trial judge ruled was so prejudicial it could not be directly offered as evidence. The prejudice to the defendant is almost certain to be as great, when the evidence reaches the jury through news accounts as when it is a part of the prosecutions evidence..."

The Petitioner is well aware that in Marshall v. United States, Supra, this Court's action was taken in that direct criminal appeal pursuant only to its inherent supervisory powers and not in terms of due process standards. It is with this problem that the Court is now confronted. The United States Court of Appeals for the Fifth Circuit in affirming the decision of the United States District Court quoted the language of the District Court opinion as follows:

> "Although the situation in Marshall is factually similar to the instant case, the rationale of that opinion militates against Petitioner's position. The Court, then, finds that a trial by jurors, each of whom has obtained knowledge of a defendant's past felony convictions through pretrial publicity does not, in light of the Supreme Court's refusal to so find, raise to constitutional proportions when each juror has satisfied the impartiality requirements set forth in Irvin v. Dowd, Supra. The Court recognizes that the distinction between acts or occurances which warrant the exercise of federal supervisory powers and those which reflect the denial of due process is often a nebulous one. Nevertheless, the dictates of federalism compel this Court to abide by the distinction whenever it exists. Petitioner's claim regarding the effects of pretrial publicity must fall."

This portion of the Court's opinion is incorrect, and fails to take into consideration the decisions of this Honorable Court and of the other United States Courts of Appeals since the ruling in Marshall v. United States, Supra.

Prior to 1959, the federal courts applied the same standards in prejudicial publicity cases, whether the case arose in either the state or federal courts. That rule required actual showing of prejudice. However, in 1959, Marshall v. United States, Supra, as previously quoted, changed that rule but only in the federal courts, holding that even though jurors stated they would not be influenced by prejudicial articles, the court reversed on the basis that the publicity of past criminal record in and of itself was so prejudicial that it required reversal.

In Irvin v. Dowd, 1961, 366 U.S. 717, 81 S. Ct. 1639, 6 L. Ed. 2d 751, this Court reaffirmed the view announced in Marshall v. United States, Supra, to wit: That prejudicial infection of a jury is not cured by statements of the individual jurors that they will not be influenced by said prejudicial infection. It is important to point out at this point that

in Irvin v. Dowd, Supra, the Court was not dealing with a federal criminal prosecution, but rather the case was before the Court as a result of a habeas corpus petition filed by a state prisoner.

In Rideau v. Louisiana, 373 U.S. 723, 83 S.Ct. 1417, 10 L.Ed. 2d 663 (1963), which was another state court action, this Court found that it was not necessary to show actual prejudice, and furthermore, it was not even necessary to show that the prejudicial material had ever reached the jury. If information was prejudicial and widespread in the community, the defendant without even making an actual showing was entitled to relief.

In June of 1966, this Court decided the case of Sheppard v. Maxwell, 1966, 384 U.S. 333, 86 S. Ct. 1507, 16 L. Ed. 2d 600. In that case, this Court concluded that Sheppard did not receive a fair trial consistent with the due process clause of the Fourteenth Amendment and, therefore, reversed the judgment. Although the pretrial publicity in Sheppard did not deal with a past criminal conviction, the Court in its dictum made the following comments concerning Marshall v. United States, Supra:

> "... freedom of discussion should be given the widest range compatible with the essential requirements of the fair and orderly administration of justice. Pennykamp v. State of Florida, 328 U.S. 331, 347, 66 S. Ct. 1029, 1037, 90 L. Ed. 1295 (1946). But it must not be allowed to divert the trial from the 'very purpose of a court system... to adjudicate controversies, both criminal and civil, in the calmness and solemnity of the courtroom according to legal procedures.' Cox v. State of Louisiana, 379 U.S. 559, 583, 85 S. Ct. 466, 471, 13 L. Ed. 2d 487 (1965) (Block, J., dissenting). Among these 'legal procedures' is the requirement that the jury's verdict be based on evidence received in open court, not from outside sources. Thus, in Marshall v. United States, 360 U.S. 310, 79 S. Ct. 1171, 3 L. Ed. 2d 1250 (1959), we set aside a federal

> conviction where the jurors were exposed 'through news accounts' to information that was not admitted at trial. We held that the prejudice from such material 'may indeed be greater' than when it is part of the prosecution's evidence 'for it is then not tempered by protective procedures.' At 313, 79 S. Ct. at 1173. At the same time, we did not consider dispositive the statement of each juror 'that he would not be influenced by the news articles that he could decide the case only on the evidence of record, and that he felt no prejudice against petitioner as a result of the articles.'...

In 1973 the Third Circuit Court of Appeals held in United States, ex rel. Doggett v. Yeager, 472 F. 2d 229 (3rd Cir. 1973) stated at page 237 of its opinion that:

> "...Marshall v. United States, Supra, while factually controlling in this case, is distinguishable on the ground that involved the Supreme Court's supervisory power over a lower federal court rather than its constitutional power to enforce the Fourteenth Amendment's due process standards. But soon after 1959 it became clear that the former rule was no longer applicable in state trials....".

The Fifth Circuit Court of Appeals in its opinion in this case recognized that said opinion was in conflict with the view announced in United States, ex rel. Doggett v. Yeager, Supra, the Court stating at page 4659, footnote 4:

> "We are aware of the view announced in United States, ex rel. Doggett, 3 Cir.1973, 472 F. 2d 229, 237-239, that Irvin v. Dowd, Supra, and Sheppard v. Maxwell, Supra, broadened the Marshall holding so as now to require that its rule be applied in state trials. While the question arose in a prejudicial publicity-change or venue setting in Doggett, we do not seriously doubt that the Third Circuit would apply its holding equally in a situation involving, as presently under discussion, denials of challenges for cause based on a jurors knowledge of prior convictions. With deference, we disagree with our sister circuit's conclusion and decline here to be guided by Doggett".

In United States v. Isaacs, 351 F. Supp. 1323 (1972), the District Court reached the same decision as the Third Circuit reached two years later, holding that "we view Sheppard as an application of the rule of Marshall v. United States,...at page 1328".

It is clear that the opinion of the United States Court of Appeals for the Fifth Circuit in the instant case is diametrically opposed to the opinion of the United States Court of Appeals for the Third Circuit and United States, ex rel. Doggett v. Yeager, Supra. Both opinions present contrasting views on an important federal question which affects the constitutional rights of not only the Petitioner herein but of all defendants who are required to appear before the bench to defend themselves in a criminal trial. From the record in this case as well as from the decision cited herein both state and federal, the following can be ascertained. All state jurisdictions as well as the federal jurisdictions prohibit either direct or circumstantial evidence concerning the defendant's past criminal record to be introduced at the trial of any defendant, unless or until such time as said defendant takes the witness stand in his own behalf. In the case at bar, the defendant did not take the witness stand. Nor did the state attempt to introduce through either direct or circumstantial evidence any facts relating to the Petitioner's past criminal record. Notwithstanding that fact, each and every one of the jurors seated, had learned of the Petitioner's extensive past criminal record through the news media.

It has long been the rule that federal courts will not permit state courts to arbitrarily deny to a defendant in a criminal case important rules of criminal procedure which

are guaranteed in all jurisdictions to all criminal defendants. To permit such conduct by the state trial courts, constitutes a clear denial of equal protection of law as guaranteed to a defendant in a state court prosecution under the Fourteenth Amendment of the United States Constitution. When the laws governing criminal cases are not applied equally to all individuals either guilty or innocent, then the ultimate results will be a breakdown in the integrity of the administration of justice. In the instant case, it is obvious that the state trial court, as well as the state appellate courts based their opinion more upon the defendant's horrendous criminal background than upon the accepted rules governing the administration of criminal justice in the State of Florida. This Honorable Court cannot permit the state courts to act so arbitrarily on such a precious constitutional right as a right to a fair and impartial trial by a jury of ones peers. As so aptly put by Judge Cuthbert Pound in his dissenting opinion in People v. Gitlow, 234 N.Y. 132, 158 (1922), "the defendant may be the worst of men ... [T]he rights of the best of men are secure only as the rights of the vilest and most abhorrent are protected." The appellate court's opinion in this case if upheld by this Honorable Court, will open the doors to allowing the states to arbitrarily determine which uniform rules of law will apply to a particular defendant in a particular case. Such a condition cannot be permitted to exist. The Court of Appeals in its opinion recognized the seriousness of the question presented to it by Petitioner's appeal. The Court further recognized a diametrically opposed opinion by the Third Circuit on a question of constitutional

law which affects every defendant who elects to be tried by a jury of his peers.

Additionally, it should be pointed out that the Court of Appeals for the Fifth Circuit failed to consider the momentous opinion of Duncan v. State of Lousiana, (1968) 391 U.S. 145, 88 S. Ct. 1444. In said case this Court held that a trial by jury in criminal cases is fundamental to the American scheme of justice, and that the Fourteenth Amendment to the United States Constitution guarantees a right of jury trial in all criminal cases which, were they to be tried in a federal court, would come within the Sixth Amendment guarantee. By its opinion in Duncan v. State of Louisiana, Supra, this Court has made applicable in all state criminal jury trials those rules applicable in federal criminal jury trials. Therefore, even if the Court of Appeals for the Fifth Circuit rejects the conclusion of the Third Circuit in Unites States, ex rel. Doggett v. Yeager, Supra, it cannot reject the mandate of this Court in Duncan v. State of Louisana, Supra.

It is for these reasons that this Court is asked to review the opinion of the United States Court of Appeals for the Fifth Circuit and ultimately to reverse that opinion and remand this cause back to the state trial courts for a new trial.

B. PRE-TRIAL PUBLICITY ON THE CASE IN CHIEF.

The various exhibits which are part of the record in the United States Court of Appeals for the Fifth Circuit established that over a period of two and one-half years, the publicity concerning the Defendant with regard to the case at bar, an also regarding the "Whiskey Creek Murders" of which Defendant was convicted only five months prior to

the trial in the case now before this Court, was so overwhelming and so prejudicial that it was impossible to obtain a jury which could sit fairly and impartially. Petitioner would agree with that portion of the United States Court of Appeals' opinion wherein the Court stated that there was a substantial period of time where there had been no publicity concerning the Petitioner. However, notwithstanding this gap of time in which the publicity was minimal if nonexistent, the jurors in this case clearly had excellent recollection of all of the events surrounding the Petitioner's past criminal exploits.

In Sheppard v. Maxwell, Supra, this Court reversed a murder conviction of Dr. Sheppard because of the pretrial publicity which attended the trial of the defendant. In doing so, the Court set down the fundamental rule of law to be followed:

> "...due process requires that the accused receive a trial by an impartial jury free from outside influence. Given the pervasiveness of modern communications and the difficulty of affecting prejudicial publicity from the minds of the jurors, the trial courts must take strong measures to insure that the balance is never weighed against the accused. And appellate tribunals have the duty to make and independent evaluation of the circumstances....but where there is a reasonable likelihood that prejudicial news prior to trial will prevent a fair trial, the judge should continue the case until the threat abates or transfer it to another county not so permeated with publicity..." (Citation Omitted)

In the case at bar, the motion for change of venue which was filed with the state trial court did not evolve around the sole fact that the news media published accounts of the case. The matters which clearly established the necessity for change of venue were:

1. The news media's earlier attack on the trial court judge for reducing the Defendant's bond in the first case which was filed, to wit: Case Number 68-530.

2. The news media's earlier prejudicial reporting concerning the state trial court's ruling declaring the Defendant incompetent in Case Number 68-530. There was such a public outcry over said ruling that several highly publicized investigations were conducted at both the state and county level.

3. The news media's continued reporting of Defendant's past criminal life and convictions.

4. The trial court's complete failure to make any attempt to control the publicity so as not to prejudice the Defendant. In fact, the trial court sought publicity because the judge was running for re-election. This is evident by the fact that the trial judge continued or transferred all of his other cases with the exception of Defendant's case and that of the also highly publicized Charles Celona case. In fact, the judge was trying both cases at the same time, devoting the mornings to Defendant's trial and the afternoons to the Celona trial.

The fact that the trial court took no steps to control publicity was readily shown by the Court's earlier order of July 8, 1968, concerning the trial of the two co-defendants in the within cause. The state trial court citing Sheppard v. Maxwell, Supra, admitted that he had failed to control publicity which had saturated the community, and therefore changed the venue for those two co-defendants. It is clear from the record now in the Court of Appeals for the Fifth Circuit that at no time either prior to or during the jury selection, did the trial Court take any steps whatsoever to control what the jurors read, said or did concerning JACK ROLAND MURPHY, the Petitioner herein.

Above and beyond, the trial Court's failure to take steps to protect the Defendant, is the actual knowledge of each of the individual jurors involved. The Statement of Facts in this Petition as well as the record now before the Court of Appeals for the Fifth Circuit clearly establishes each jurors familiarity with the Defendant not withstanding the fact that a substantial portion of the publicity surrounding the Petitioner had occurred months prior to the actual trial of the within cause. In United States ex rel. Bloeth v. Denno, 313 F.2d 364 (2nd Cir. 1963), the Court in a case similar to the case at bar held:

> "We have examined the record, including voir dire examination of the jurors challenged or execused, which was not before Judge Cashin. His conclusion that lack of impartiality of the trial jury had not been established appears to us clearly erroneous. Jury impartiality must be measured by the standards established by the Supreme Court in the line of cases culminating in Irvin v. Dowd . . . . There the court traced the history of the development of the rule in the fact of the wide growth of crime coverage by expanding news, pointing out the right to a fair trial by a panel of impartial, 'indifferent jurors', the growing difficulty of obtaining a panel who has never heard of a well known case, the acceptability of a juror who had some preconceived notion of guilt or innocence, provided the juror could lay aside his impression or opinion and render a verdict based on the evidence presented in court. Applying these rules to the facts of that case, however, it was made plain that merely going through and obtaining the jurors' assurances or impartiality is insufficient. The reviewing court must determine from a review of the entire voir dire whether the extent and nature of the publicity had caused such a build up of prejudice that excluding the preconception of guilt from the deliberations would be too difficult for the jury to be honestly found impartial."

As shown from the breakdowns of the jurors' statements, the jury had sufficient knowledge of this case, including the

controversial ruling concerning bond and the Petitioner's sanity, as well as Petitioner's past criminal background that the interest of justice would have best been served had the trial Court granted the motion for change of venue. The comments of one particular juror amply sets forth the demeanor and thoughts of the prospective jury panel which was being questioned.

> "Q. (MR. NAGELEY) Now, did you hear any of the panel, prospective panel, discussing the Murph the Surf case?
>
> A. (MR. FERGUSON) Sure.
>
> Q. And, would you tell us generally what was the nature of the discussions?
>
> A. Well, its just -- talk. I would say seriously -- I would say that I thought that some of the discussions that I overheard, that the people involved with, seriously from what I heard, made me sick to my stomach."
>
> * * * *
>
> "Q. But tell us what the comments were that caused you to feel sick to your stomach?
>
> A. Like, "hang him, he is guilty'. This kind of thing."

Comments such as this as well as the examination of all of the jurors involved, clearly reflect that the possibility of obtaining a fair and impartial jury in light of all of the publicity, surrounding the Petitioner, JACK ROLAND MURPHY, as well as each jurors' knowledge of the Defendant's past criminal record practically non-existent notwithstanding any assurances which said jurors might have given the Court.

By way of analogy, it is noteworthy to point out to this Court that the State trial Court Judge was advised of an Order entered by Federal Judge Joe Eaton in the United States District Court, Case No. 68-360 transferring the trial of JACK ROLAND MURPHY and the other co-defendants to Pensacola, Florida. The Order transferring the federal

case, occurred at just three months prior to the trial of this case. In a hearing held by Judge Eaton several months prior to the entry of his Order transferring the case the Court recognized the extensive notoriaty of the Whisky Creek murder case by stating the following:

> "People in this county can tell you who Murph the Surf is, who would not have the slightest idea who Earl Faircloth is, and I think this is a fair statement . . . . this man is simply too widely known."
>
> . . . I am not trying to be funny about it, but it is perfectly obvious for weeks after the matter with Judge Stedman, his ruling, I could not go to a social event, I would want to sit down and talk about the Dolphins, but everybody there wanted to ask me about Murph the Surf . . ."

Notwithstanding the fact that these comments were made by JudgeEaton on March 6, 1969, it is quite obvious that at least three months prior to the trial in the Wofford case the Judge by his order transferring the federal case to another county recognized that the publicity and notoriaty surrounding JACK POLAND MURPHY the Petitioner herein still existed.

CONCLUSION

For the reason set forth in this Petition and based upon the cases cited therein, the Petition for Certiorari should be granted and the Judgment of the Court of Appeals reversed.

Respectfully submitted,

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IN THE SUPREME COURT OF THE UNITED STATES

_____TERM, 1974

NO. 74-5116

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STATE OF FLORIDA,

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APPENDIX TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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APPENDIX "A"

Jack Roland MURPHY, Petitioner-Appellant,

v.

STATE OF FLORIDA, Respondent-Appellee.

No. 73-3528.

United States Court of Appeals,
Fifth Circuit.

June 10, 1974.

State prisoner petitioned for habeas corpus. The United States District Court for the Southern District of Florida, at Miami, C. Clyde Atkins, J., 363 F.Supp. 1224, denied the petition, and petitioner appealed. The Court of Appeals, Simpson, Circuit Judge, held that (1) failure to grant defendant's motion for a change of venue on ground of prejudicial pretrial publicity was not a denial of due process, (2) trial by jurors who knew that defendant was a convicted felon did not rise to constitutional proportions and was thus not ground for issuance of writ, and (3) refusal of state trial court to grant a bifurcated trial on the issues of guilt and sanity did not rise to constitutional dimensions and was therefore not ground for issuance of writ.

Affirmed.

1. Constitutional Law ⇐259

Failure to grant defendant's motion for a change of venue on ground of prejudicial pretrial publicity was not a denial of due process, where newspaper articles were largely factual rather than inflammatory, where most of the publicity occurred a year and a half to three years prior to trial, and where the five jurors who had some knowledge of the facts of the robbery possessed only a vague recollection thereof.

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INDEXED

2. Habeas Corpus ⇐85.3(1)

Statement made by federal judge 16 months prior to state court trial of robbery case, and addressed to entirely different considerations, was irrelevant in the context of habeas corpus petition attacking state court convictions.

3. Habeas Corpus ⇐55.5(8)

Trial by jurors who knew that defendant was a convicted felon did not rise to constitutional proportions and was thus not ground for issuance of writ of federal habeas corpus, where each juror satisfied impartiality requirements in light of their assurances to the court that they would reach a verdict based solely on the evidence introduced at trial.

4. Habeas Corpus ⇐45.2(1)

Refusal of state trial court to grant a bifurcated trial on the issues of guilt and sanity did not rise to constitutional dimensions and was therefore not ground for issuance of writ of federal habeas corpus.

5. Constitutional Law ⇐263

Due process does not require a separate trial, and the states and their courts are free to determine whether the issues of guilt and sanity should be tried separately or together.

Appeal from the United States District Court for the Southern District of Florida.

Before GEWIN, THORNBERRY and SIMPSON, Circuit Judges.

SIMPSON, Circuit Judge:

The lower court, by a reported opinion, Murphy v. State of Florida, S.D.Fla.1973, 363 F.Supp. 1224, denied appellant's petition for habeas corpus relief from two state sentences received in a single trial, to life imprisonment for armed robbery and consecutively to twenty years imprisonment for assault with intent to commit robbery. We affirm.

The attack upon the state convictions both in the trial court and here is based primarily upon a claim of denial of Fourteenth Amendment due process because of extensive pre-trial newspaper publicity regarding Murphy, known as "Murph the Surf",[1] and resultant prejudice to his Sixth Amendment right to a trial before an impartial jury. Inasmuch as the background facts are fully set forth in the lower court's opinion,[2] a brief outline of them will suffice here.

The issues here as below are (1) whether the Florida state trial court erred in denying appellant a change of venue in the light of the pre-trial publicity; (2) whether that court erred in failing to dismiss for cause those trial jurors who knew Murphy was a convicted felon; and (3) whether that court erred in refusing to bifurcate the trial on the issues of guilt and sanity.

Petitioner was arrested with three other persons in January 1968 as they fled the scene in Dade County, Florida of the robbery of Mrs. Olive Wofford, a wealthy resident of Miami Beach. In May, 1968 before his trial for the Wofford robbery, the petitioner was arrested and indicted for the double murder in an adjoining Florida county, Broward, of two young women, Terry Rae Kent Frank and Annalie Mohn. These killings became notorious in the press as the "Whiskey Creek Murders."

Pre-trial proceedings in the Wofford robbery case involved the trial judge's controversial ruling as to the petitioner's competency to stand trial. Extensive newspaper coverage again occurred. The robbery charges in the Wofford case were nolle prossed to permit the Broward County trial for the Whiskey Creek Murders to proceed. In August 1968, prior to that murder trial, Murphy and three others were indicted by a

1. Murphy had received nationwide press attention in 1964 for his role in the theft of the "Star of India" sapphire from the New York Museum of Natural History. The public media's use of the nickname "Murph the Surf" dated from that time.

2. Adopted as correct by both parties to this appeal.

federal grand jury for conspiring to transport stolen securities in interstate commerce, charges related to the Whiskey Creek case and so played up in the press. Murphy was found guilty on March 1, 1969, of one of the Whiskey Creek Murders, that of Terry Rae Kent Frank. Again, the trial and its result were extensively publicized by the news media.

Thereafter on August 25, 1969, the state prosecutor refiled the Wofford robbery case. In December of the same year, Murphy pled guilty to one count of the federal indictment.[3] During the early July 1970 pre-trial proceedings in the Wofford case, Murphy moved for change of venue on the basis of prejudicial pre-trial publicity, including the publicity attendant upon the earlier hearing in the Wofford robbery case, the Star of India theft, the Whiskey Creek Murders, and the

3. A statement made by the presiding judge, U. S. District Judge Eaton, in the course of these proceedings did not occur shortly before the Wofford robbery trial in the state court, as stated by appellant's brief. The record shows that Judge Eaton's statement was made at a March 6, 1969 hearing, not at a 1970 hearing, as appellant's brief seems to indicate. At that hearing Judge Eaton granted a continuance of the case before him, No. 68-360, rather than rule on a motion for change of venue. His ruling was based on expediency:

> "I am forgetting the question of prejudice and being very practical about it . . . . I think if we tried to do that next week, that we would spend a week on voir dire and never conceivably get a jury. Speaking of the time in Court, I have five other criminal cases I could be trying while we are asking these folks if they know anything about Murph the Surf, because I am telling you, they do. People in this County can tell you who Murphy is, who would not have the slightest idea who Earl Faircloth is, and I think that is a fair statement. I am not talking about any prejudicial newspaper coverage at all. It may be that because Mr. Murphy has simply sort of, somehow or another, become pretty good publicity; but the point is, considering for a moment every count in every trial which was ever had was entirely fair, this man is simply too widely known, and so is Griffith and Kuhn, to some degree."

As noted in the text, Murphy pled guilty to one count of this indictment in 1969. Judge Eaton thereafter granted a change of venue to Pensacola in the Northern District of Florida to the remaining defendants under that indictment. Their case was tried and disposed of by him in Pensacola in April 1970.

federal conspiracy charges. The state trial judge deferred ruling on this motion pending voir dire examination of the jury panel. Voir dire commenced on July 27 and was completed on August 10, 1970. Of 78 veniremen questioned, 12 were excused peremptorily by the petitioner, and 8 by the state, 27 were excused for medical or economic reasons and 3 were excused for miscellaneous reasons. 20 were excused because they stated that they had formed an opinion as to petitioner's guilt and could not give him a fair trial. 8 jurors were selected to serve at the trial, 6 regular and 2 alternate.

Of the 8 selected, 5 had read or heard about the facts surrounding the Wofford robbery through the media, from discussions with friends or through discussions with other prospective jurors. Each of the eight knew that Murphy had previously been convicted either in the Star of India theft or the Whiskey Creek Murders, but each assured the court that he would reach a verdict based solely on evidence introduced at the trial. The court denied the motion for change of venue and the trial proceeded. Murphy's plea of insanity was rejected and he was convicted and sentenced, as noted supra, to life imprisonment and to a term of twenty years consecutive thereto.

The court below carefully weighed the claim of denial of due process on the basis of prejudicial pre-trial publicity, accepting his "duty to make an independent evaluation of the circumstances", Sheppard v. Maxwell, 1966, 384 U.S. 333, 86 S.Ct. 1507, 16 L.Ed.2d 600, but imposing upon the petitioner the burden of showing that his conviction was a result of "essential unfairness . . . not as a matter of speculation but as a demonstrable reality", Adams v. United States ex rel. McCann, 1942, 317 U.S. 269, 281, 63 S.Ct. 236, 242, 87 L.Ed. 268. The district court was "sensitive to the delicate balance that must be struck as a result of the pervasiveness of modern communications and the need to insure a fair trial for the accused", 363 F.Supp. at 1226, adopting the approach set forth in United States v. Agueci, 2 Cir. 1962, 310 F.2d 817, cert.

denied, 1963, 372 U.S. 959, 83 S.Ct. 1016, 10 L.Ed.2d 12; Irvin v. Dowd, 1961, 366 U.S. 717, 722–723, 81 S.Ct. 1639, 1642, 6 L.Ed.2d 751, and Reynolds v. United States, 1878, 98 U.S. 145, 156–157, 25 L.Ed. 244. The district judge found the presence of some objective criteria, Beck v. Washington, 1962, 369 U.S. 541, 82 S.Ct. 955, 8 L.Ed.2d 98, in the nature and the time span of the pre-trial publicity. We are in agreement with his determination that since the newspaper articles were largely factual rather than inflammatory, and since the dates of the news clippings and edited television news releases were almost entirely between December 15, 1967 and January 24, 1969 (only five articles being presented to the court bearing dates of the period of the jury selection and only one of those being a front-page article) the passage of time is a crucial factor in this case. We find no record basis upon which to disturb his finding that "each of the five jurors who had some knowledge of the facts of the Wofford robbery possessed only a vague recollection of the facts." 363 F.Supp. at 1229.

[1] We agree with the district court that the failure to grant the motion for change of venue was not a denial of due process.

[2] In this connection the petitioner urges that the language used by Judge Eaton (quoted Note 3, supra) in granting a continuance in the federal conspiracy trial show that a change of venue was mandated in the Wofford robbery trial in state court. This is a new contention, not relied upon before the district court. These remarks were as Judge Eaton stated, not based on the question of prejudice, but entirely on his own estimate of the practicalities of the situation and the conservation of his own judicial time. Made as it was sixteen months prior to the state court trial of the Wofford robbery case, and addressed to entirely different considerations, his statement is irrelevant in the context of this habeas corpus petition. We find petitioner's argument in this respect to be without substance.

[3] The second issue, whether each juror who possessed knowledge of Murphy's previous felony convictions, should have been excluded for cause is, as stated by the court below, more troublesome, but we affirm his rejection of this ground of attack by his excellent analysis at pages 1229–1230, 363 F.Supp. As pointed out there, Marshall v. United States, 1959, 360 U.S. 310, 79 S.Ct. 1171, 3 L.Ed.2d 1250, will not support issuance of the writ on this ground, since as the Supreme Court was at pains to point out, 360 U.S. at 313, 29 S.Ct. at 1171, its action was taken in that direct criminal appeal pursuant only to its inherent supervisory powers and not in terms of due process standards. We think the district court correctly appraised the situation in its refusal on grounds of federalism to grant the writ on this ground of the petition.[4] The district court's holding in this respect is well summarized in the following language:

> "Although the situation in *Marshall* is factually similar to the instant case, the rationale of that opinion militates against Petitioner's position. This Court, then, finds that a trial by jurors, each of whom has obtained knowledge of a defendant's past felony convictions through pre-trial publicity does not, in light of the Supreme Court's refusal to so find, rise to Constitutional proportions when each juror has satisfied the impartiality requirements set forth in Irvin v. Dowd, supra. The Court recognizes that the distinction between acts or occurrences which warrant the exercise of federal supervisory powers and those which reflect a denial of due process is often a nebulous one. Nevertheless, the

4. We are aware of the view announced in United States ex rel. Doggett, 3 Cir. 1973, 472 F.2d 229, 237–239, that Irvin v. Dowd, supra, and Sheppard v. Maxwell, supra, broaden the *Marshall* holding so as now to require that its rule be applied to state trials. While the question arose in a prejudicial publicity-change of venue setting in *Doggett*, we do not seriously doubt that the Third Circuit would apply its holding equally in a situation involving, as presently under discussion, denials of challenges for cause based on a juror's knowledge of prior convictions. With deference, we disagree with our sister Circuit's conclusion and decline here to be guided by *Doggett*.

dictates of federalism compel this Court to abide by that distinction whenever it exists. Petitioner's claim regarding the effects of pre-trial publicity must fall." 363 F.Supp. at 1230.

[4, 5] Finally, we agree with the holding below that the final ground of attack, the refusal of the state trial court to grant a bifurcated trial on the issues of guilt and sanity, does not rise to constitutional dimensions. Due process does not require a separate trial and the states and their courts are free to determine whether such issues should be tried separately or together. United States v. Huff, 5 Cir. 1969, 409 F.2d 1225, cert. denied, 1969, 396 U.S. 857, 90 S.Ct. 123, 24 L.Ed.2d 108.

The judgment appealed from is in all respects

Affirmed.

Adm. Office, U.S. Courts—West Publishing Company, Saint Paul, Minn.

APPENDIX "B"

United States Court of Appeals

FIFTH CIRCUIT

EDWARD W. WADSWORTH
CLERK

OFFICE OF THE CLERK

600 CAMP STREET
NEW ORLEANS, LA. 70130

July 12, 1974

TO ALL COUNSEL OF RECORD

Re: 73-3528 MURPHY V. STATE OF FLORIDA

Gentlemen:

This is to advise that an order has this day been entered denying the petition( ) for rehearing, and no member of the panel nor Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure; Local Fifth Circuit Rule 12) the petition( ) for rehearing en banc has also been denied.

See Rule 41, Federal Rules of Appellate Procedure for issuance and stay of the mandate.

Very truly yours,

EDWARD W. WADSWORTH
CLERK

By Anne D. Parent
Deputy Clerk

cc: Mr. Harvey S. Swickle
Mr. J. Robert Olian
Mr. Robert L. Shevin
Mr. William L. Rogers

APPENDIX "C"

NOT FINAL UNTIL TIME EXPIRES
TO FILE REHEARING PETITION
AND, IF FILED, DISPOSED OF.

IN THE DISTRICT COURT OF APPEAL

OF FLORIDA

THIRD DISTRICT

JULY TERM, A.D. 1971

JACK ROLAND MURPHY, **

Appellant, **

vs. ** CASE NO. 70-996

THE STATE OF FLORIDA, **

Appellee. **

**

Opinion filed September 21, 1971.

An Appeal from the Criminal Court of Record for Dade County, Carling Stedman, Judge.

Jack R. Nageley and Harvey S. Swickle, for appellant.

Robert L. Shevin, Attorney General, and J. Robert Olian, Assistant Attorney General, for appellee.

Before SWANN, C.J., and PEARSON and BARKDULL, JJ.

PER CURIAM.

The appellant was tried before a jury in the Criminal Court of Record for Dade County upon a two count information charging the defendant with (1) breaking and entering a dwelling with intent to commit a felony, to wit: robbery, and (2) robbery. The jury found him guilty upon count 1 and guilty of the lesser included offense of assault with intent to commit a felony to wit robbery upon count 2. He was adjudicated guilty on each count and sentenced to life in prison upon count 1, and to 20 years upon count 2. This appeal is from the judgment and sentence.

Appellant presents five points upon appeal. They are as follows: 1. The court erred in denying appellant's motion for a change of venue. 2. The court erred in denying appellant's motion to excuse for cause each of the members of the jury panel because of knowledge of appellant's past criminal record. 3. The court erred in denying appellant's motion to strike the testimony of the state's psychiatrists. 4. The court erred in denying appellant's motion for a bifurcated trial on the issues of guilt and insanity. 5. The evidence was insufficient as to count 1 because it was insufficient to establish ownership of the dwelling which was broken into by appellant.

Appellant directs the major portion of his brief and argument to point 1. Appellant's motion for change of venue was filed prior to trial and the court deferred ruling until after jury selection began. It was renewed after a jury was seated and the motion was denied. The motion had attached as exhibits many newspaper reports. Most of these newspaper stories concerned other criminal charges against the appellant; the trial of these charges and the adjudication that appellant was guilty of the charges. An examination of these reports reveals that they are for the most part factual accounts. There is no demonstration or argument that the reports were highly colored or inflamatory.

Seventy-eight jurors were called. The appellant excused 12 peremptorily and the state excused 8; 30 were excused for reasons not related to this appeal; 20 were excused because they might have formed an opinion as to appellant's guilt. A jury of six and two alternates were sworn.

Appellant's argument under point 1 asserts that the exhibits attached to the motion and those presented in court demonstrate such "overwhelming prejudicial publicity against the defendant

with regard to the case at bar and - (his) past criminal life" [emphasis supplied] that the exposure of the prospective jurors to these printed accounts demonstrates an abuse of discretion in the denial of his motion for a change of venue. He relies upon the law as established in Sheppard v. Maxwell, 384 U.S. 333, 86 S. Ct. 1507, 16 L.Ed. 2d, 600 (1966), and expounded in United States v. Denno 313 F.2d 364 (2nd Cir. 1963); Pamplin v. Mason, 364 F.2d 1, (5th Cir. 1966).

In considering the error urged we begin with the basic fact that we are reviewing a discretionary ruling by the trial judge and that we ought not to reverse unless an abuse of that discretion is made to appear. Singer v. State, Fla. 1959, 109 So.2d 7. We recognize that where the record reveals a likelyhood of bias by the jury a question of appellant's constitutional right to a fair trial is involved and federally established standards must be applied.

Our review of the record before us convinces us that this point must be decided adversely to the appellant's contention, upon the rule stated in Collins v. State, Fla.App.1967, 197 So.2d 574, modified for other reasons 203 So.2d 28. We further hold that upon the application of the test set forth in Pamplin v. Mason, 364 F.2d 1 (5th Cir. 1966) no violation of appellant's constitutional right to a fair trial appears.

Point 2, which urges that the trial court erred in denying appellant's motion to excuse for cause each member of the jury panel, covers much of the same ground as the argument under point 1. The contention is that because the members of the panel knew or must have known of appellant's conviction for other crimes that they were not

qualified as jurors. The appellant presents no authority for his statement that a knowledge of a prior conviction disqualifies a juror. We do not think that reason supports such a contention. Florida Statute § 910.03 provides that criminal prosecutions shall be tried in the county where the offense is committed. This direction implies a trial by fellow citizens, many of whom may know the defendant. The concept that a trial should be in a vacuum in order to be fair finds no basis in our legal tradition. Absent a showing of bias it is presumed that the jurors will base their verdict upon the evidence given at the trial. No error appears under point 2. See Singer v. State, Fla.1959, 109 So.2d 7; McCullers v. State, Fla.App. 1962, 143 So.2d 909.

Appellant's third point argues that the trial court should have excluded the testimony of the two court appointed psychiatrists at the hearing held before trial to determine appellant's competency to stand trial. It is urged that because the psychiatrists obtained all their information from interviews with the appellant and there were no independent "tests" that their testimony as to appellant's mental condition was incompetent. Appellant relies upon Cirack v. State, Fla.1967, 201 So.2d 706 and Martin v. State, Fla.App.1969, 218 So.2d 195 for this proposition. We do not think the authority cited supports a reversal here. The cases cited hold that where the testimony of a witness is based upon a particular evidentiary statement from the defendant the testimony may be excluded. Here the appointed physicians reported their conclusions from their observations and their interview with the defendant. Such medical procedure has not

been shown to be incompetent.

Appellant's fourth point urging a right to a separate trial on the issue of insanity is not supported by authority in this state and is without merit. Also appellant's fifth point directed to the sufficiency of the evidence of the ownership of the dwelling is without merit. Young v. State, Fla.App.1964, 162 So.2d 297.

Affirmed.

APPENDIX "D"

FILED

AUG 29 1973

JOSEPH L. BOGART
CLERK, U. S. DIST. CT.
SOUTHERN DIST. OF FLA.
MIAMI FLA.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

No. 73-151-Civ-CA

JACK ROLAND MURPHY,

Petitioner,

v.

THE STATE OF FLORIDA,

Respondent.

ORDER DENYING PETITION FOR HABEAS CORPUS

Petitioner, Jack Roland Murphy, is before the Court upon filing of his second Petition for Writ of Habeas Corpus.[1] In the instant petition, Murphy contends that his confinement, which stems from a 1970 conviction in Dade County Criminal Court, is unlawful in that (1) the trial court erred by denying his motion for a change of venue in light of allegedly prejudicial pre-trial publicity; (2) the trial court failed to dismiss for cause those jurors who knew that Petitioner was a convicted felon; (3) the trial court committed reversible error in denying Petitioner's motion to bifurcate the trial on the issues of guilt and sanity.

To fully appreciate the issues raised by Petitioner, it is necessary to set forth much of his notorious background. Prior to his involvement in the crime which is the subject of this petition, Murphy had focused nationwide attention on himself for his role in the 1964 theft of the "Star of India" sapphire from the New York Museum of Natural History. As a result of that enterprise and because of certain physical characteristics, Murphy was popularly referred to as "Murph the Surf."

On January 28, 1968, Petitioner and three others were apprehended as they fled from the scene of a robbery of a wealthy Miami Beach resident, Olive Wofford. In May, 1968, prior to the trial on charges stemming from this incident, Petitioner was arrested and indicted for the double murder of Terry Rae Kent Frank and Annalie Mohn. The news media referred to these killings as the "Whiskey Creek Murders."

During the pre-trial proceedings in the Wofford robbery case, substantial attention was devoted by the media to a controversial ruling by the trial judge regarding Petitioner's competency to stand trial. Subsequently, the charges in the Wofford robbery case were nolle prossed so that the trial in Broward County on the Whiskey Creek Murders could commence. Then on August 14, 1968, Petitioner and three others were indicted by a United States Grand Jury for conspiring to transport stolen securities in interstate commerce. Those charges were closely related to the Whiskey Creek case. On March 1, 1969, Petitioner was found guilty of the murder of Terry Rae Kent Frank. On August 25, 1969, charges in the Wofford robbery case were refiled. In December of the same year, Murphy pled guilty to one count of the federal indictment.

In July of 1970, pre-trial proceedings in the Wofford case began. Petitioner filed a motion for change of venue based on allegedly prejudicial pre-trial publicity. The trial court deferred ruling on this motion until voir dire of the jury panel was completed. On July 27, 1970, the voir dire commenced. It was completed on August 10, 1970. Eventually, Murphy's plea of insanity was rejected and he was convicted and sentenced to serve a term of life imprisonment for the crime of breaking and entering a dwelling with intent to commit robbery being then and there armed and/or assaulting persons therein. He was also sentenced to serve a term of twenty years, consecutive to the first term imposed, for the crime of assault with the intent to commit robbery.

Initially, Murphy contends that the failure to change venue

[1] Murphy's first Petition was dismissed by this Court for failure to exhaust state remedies. Order of Dismissal, Murphy v. Wainwright, 72-1392-Civ-CA (December 7, 1972).

constituted a denial of due process. Petitioner asserts that the publicity surrounding the Wofford robbery and his notoriety attributable to the "Star of India" theft and "Whiskey Creek Murders" negatived any chance for a fair trial that he might otherwise have had in Dade County.

At the outset, it is important to recognize that a trial judge has broad discretion in determining the proper course of action when allegations of prejudicial pre-trial publicity are made. United States v. Collins, 5th Cir. 1972, ____ F.2d ____ [January 24, 1973; No. 72-2063]. Yet that discretion is not unbridled. The Supreme Court has mandated that the federal courts exercise "the duty to make an independent evaluation of the circumstances" surrounding a claim of prejudicial pre-trial publicity. Sheppard v. Maxwell, 384 U.S. 333, 362 (1966). Nevertheless, Petitioner must sustain the burden of showing that his conviction was a result of "essential unfairness. . . not as a matter of speculation but as a demonstrable reality." Adams v. United States ex rel McCann, 317 U.S. 269, 281 (1942).

The Court is sensitive to the delicate balance that must be struck as a result of the pervasiveness of modern communications and the need to insure a fair trial for the accused. The dilemma facing the courts today and the approach that must be taken pursuant thereto were set forth by the United States Court of Appeals for the Second Circuit in United States v. Agueci, 310 F.2d 817, 832 (1962):

> The typical jury, in this age of mass communications, is not hermetically sealed from the events occurring all about them. Of course, an effort must be made by the trial judge to caution jurors against considering extra-judicial statements pertinent to the guilt or innocence of the individuals upon whom they sit in judgment. Where the cautionary instructions are adequate, as they were here, and where the news reporting was merely routine and hardly inflammatory, the trial judge does not abuse his discretion by refusing to declare a mistrial: "Trial by newspaper may be unfortunate, but it is not new and, unless the court accepts the standard judicial hypothesis that cautioning instructions are effective, criminal trials in the large metropolitan centers may well prove impossible." (citations omitted)

Built into our system are numerous procedures by which the effects of prejudicial pre-trial publicity may be uncovered and eliminated. Chief among these are the granting of a continuance or change of venue and the conducting of an extensive voir dire of prospective jurors.

The trial judge properly deferred ruling on the motion for a change of venue in the case sub judice until he had an opportunity to see the results of the voir dire of the jury panel, which was conducted by counsel. See Hoffa v. Gray, 323 F.2d 178, 180 (6th Cir. 1963), cert. denied 375 U.S. 907. The trial court's action was reasonable in light of the fact that the publicity surrounding Petitioner's exploits had, to a great extent, subsided by July of 1970. Moreover, the judge would have no reason to believe that Murphy, who was known statewide, if not nationwide, would not have as good an opportunity to receive a fair trial in Dade County as he would have anywhere else in Florida. In any event, an extensive voir dire would stand as the primary safeguard against the erosion of Petitioner's right to a fair trial because of the existence of allegedly prejudicial pre-trial publicity.

Petitioner contends, however, that the results of the voir dire of the panel necessitated the granting of his motion to change venue. A thorough review of the record of the voir dire reflects the following disposition of the panel. Of the seventy-eight jurors questioned, twelve were excused peremptorily by the Petitioner; twenty-seven were excused for medical, family or economic reasons; three were excused for miscellaneous reasons; twenty were excused because they had formed an opinion that Petitioner was guilty and they could not give the Petitioner a fair trial; eight prospective jurors were peremptorily excused by the State. Eight jurors were selected to serve at the trial--six regular and two alternates.

Of the eight selected, five had read or heard about the facts surrounding the Wofford robbery through the media, from discussions with friends and neighbors, or through discussions with other prospective jurors. Each of the eight selected jurors knew that the Petitioner had previously been convicted in either the Star of India theft or the Whiskey Creek murders.

The crucial issue before this Court is whether either knowledge of the facts surrounding the Wofford robbery or knowledge of the Petitioner's prior felony convictions was sufficient to render these jurors impartial in light of their assurances to the court that they would reach a verdict based solely on the evidence introduced at trial.[2] The Supreme Court of the United States, realizing the dilemma faced by the courts in ensuring a fair trial for the accused who has been the target of pre-trial publicity, set forth the test for ascertaining the impartiality of a prospective juror. The Court stated:

> It is not required, however, that the jurors be totally ignorant of the facts and issues involved. In these days of swift, widespread and diverse methods of communication, an important case can be expected to arouse the interest of the public in the vicinity, and scarcely any of those best qualified to serve as jurors will not have formed some impression or opinion as to the merits of the case. This is particularly true in criminal cases. To hold that the mere existence of any pre-conceived notion as to the guilt or innocence of the accused, without more, is sufficient to rebut the presumption of a prospective jurors impartiality would be to establish an impossible standard. It is sufficient if the juror can lay aside his impression or opinion and render a verdict based on the evidence presented in court. Irvin v. Dowd, 366 U.S. 717, 722-23 (1961).

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[2] Florida law provides as follows:
§913.03 Grounds for Challenge to Individual Jurors for Cause

> 10) The juror has a state of mind regarding the defendant, the case, the person alleged to have been injured by the offense charged, or the person on whose complaint the prosecution was instituted that will prevent him from acting with impartiality, but the formation of an opinion or impression regarding the guilt or innocence of the defendant shall not be a sufficient ground for challenge to a juror if he declares and the court determines that he can render an impartial verdict according to the evidence.

Petitioner is in the position of asking this Court to infer that the jurors in this case were biased because they were aware of his prior felony convictions or were familiar with some of the facts and issues involved in the case. The Court hesitates to draw such an inference in light of each juror's protestations of impartiality. Petitioner carries the burden of proving "whether the nature and strength of the opinion formed are such as in law necessarily. . . raise the presumption of partiality. . . . Unless he shows the actual existence of such an opinion in the mind of the juror as will raise the presumption of partiality, the juror need not necessarily be set aside. . . ." Reynolds v. United States, 98 U.S. 145, 156-57 (1878).

The Court is not without some objective criteria by which the jurors' proclamations of impartiality may be measured. If the pre-trial publicity were intensive or extensive or the examination of the entire panel revealed widespread prejudice against the defendant, the Court could, as a matter of law, disregard the jurors' estimation of themselves. Beck v. Washington, 369 U.S. 541 (1962). After careful consideration of the record, the Court concludes that no such widespread prejudice against the Petitioner was harbored by the jury panel. Furthermore, the publicity of which Petitioner complains was, as the State appellate court found, largely factual, rather than inflammatory in nature. Also, the dates on the great majority of newpaper clippings and edited television news releases show that they had been published between December 15, 1967 and January 24, 1969. Only five articles have been presented to the Court bearing dates of the period of the jury selection and of these, only one received front-page coverage.

Petitioner's contention that publicity which focused upon him a year and a half to three years prior to trial must be deemed conclusively prejudicial must fail in light of the Supreme Court's

opinion in Beck v. Washington, supra. In Beck, the defendant, a labor union official, was convicted on a charge of embezzlement of union funds. His trial occurred nine and one-half months after he was first called before a highly-publicized Senate Committee and five months after indictment. The publicity that arose at the time of trial was neither intensive nor extensive. Addressing itself to the contention that the defendant was prejudiced by the pretrial publicity, the Court stated:

> Although most of the persons thus selected for the trial jury had been exposed to some of the publicity related above, each indicated that he was not biased, that he had formed no opinion as to petitioner's guilt which would require evidence to remove, and that he would enter the trial with an open mind disregarding anything he had read on the case. 369 U.S. at 557.

The passage of time is a crucial factor in determining the effects of the pre-trial publicity on a jury panel. In fact, the Court finds that each of the five jurors who had some knowledge of the facts of the Wofford robbery possessed only a vague recollection of the facts. The cases relied upon by Petitioner, Pamplin v. Macon, 364 F.2d 1 (5th Cir. 1966); United States ex rel Bloeth v. Denno, 313 F.2d 364 (2d Cir. 1963); Sheppard v. Maxwell, supra; and Irvin v. Dowd, supra are inapposite. Those cases present situations factually distinct from the case sub judice.

The issue of whether each juror who possessed knowledge of Murphy's previous felony convictions should have been excluded from service for cause is more troublesome. Those convictions were inadmissible at trial since Murphy did not take the stand.[3] The Court finds, however, that Petitioners' reliance on Marshall v. United States, 360 U.S. 310 (1959) is misplaced. In Marshall

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[3] Fla. R. Evid. 99.

the defendant was charged with unlawfully dispensing drugs without a prescription in violation of 21 U.S.C. §353(b)(1)(B). The defendant did not take the stand but he did raise the issue of entrapment. Seeking to rebut this issue, the Government proferred proof that petitioner had previously practiced medicine without a license. The trial judge refused this offer on the grounds of relevance and prejudice. During the trial, though, two newspaper articles, which reflected petitioner's past felony convictions and admissions to having previously dispensed drugs without a license, were read by seven jurors. Despite the fact that the trial judge subsequently subjected each juror to intensive voir dire to insure that his impartiality was not compromised, the Supreme Court reversed the conviction. In so doing, however, the Court stressed that the action was taken pursuant to its inherent supervisory powers only. Marshall, supra at 313. The Court refrained from analyzing the issue in terms of due process standards.

It is axiomatic that a federal district court will not sit as an appellate court to review the wisdom of state court procedures or to review all errors that may be claimed to have been committed in the course of state criminal trial. The concept of federalism dictates that federal courts overturn a state conviction only where specific constitutional protections have been impugned or where circumstances amounting to a denial of fundamental fairness exist. Colbroth v. Wainwright, 466 F.2d 1193 (5th Cir. 1972) Flanagan v. Beto, 437 F.2d 895 (5th Cir. 1971). The relationship between the federal supervisory power, which underlies the Marshall opinion, and the commands of due process was set forth by the Supreme Court in McNabb v. United States, 318 U.S. 332 (1943). The Court stated:

> For, while the power of this Court to undo convictions in state courts is limited to the enforcement of those "fundamental principles of liberty and justice," Herbert v. Louisiana, 272 U.S. 312 (1926), which are secured by the Fourteenth Amendment, the scope of our reviewing

power over convictions brought here from the Federal courts is not confined to ascertainment of Constitutional validity. Judicial supervision of the administration of criminal justice in the Federal courts implies the duty of establishing and maintaining civilized standards of procedure and evidence. Such standards are not satisfied merely by observance of those minimal historic safeguards for securing trial by reason which are summarized as "due process of law" and below which we reach what is really trial by force. Moreover, review by this Court of state action expressing its notion of what will best further its own security in the administration of criminal justice demands appropriate respect for the deliberative judgment of a state in so basic an exercise of its jurisdiction. Considerations of large policy in making the necessary accommodations in our Federal system are wholly irrelevant to the formulation and application of proper standards for the enforcement of the Federal criminal law in the Federal courts. 318 U.S. 340-41.

Although the situation in Marshall is factually similar to the instant case, the rationale of that opinion militates against Petitioner's position. This Court, then, finds that a trial by jurors, each of whom has obtained knowledge of a defendant's past felony convictions through pre-trial publicity does not, in light of the Supreme Court's refusal to so find, rise to Constitutional proportions when each juror has satisfied the impartiality requirements set forth in Irvin v. Dowd, supra. The Court recognizes that the distinction between acts or occurrences which warrant the exercise of federal supervisory powers and those which reflect a denial of due process is often a nebulous one. Nevertheless, the dictates of federalism compel this Court to abide by that distinction whenever it exists. Petitioner's claim regarding the effects of pre-trial publicity must fall.

Similarly, Petitioner's argument that the trial court committed reversible error in denying his motion to bifurcate the trial on the issues of guilt and sanity must fail in light of the nature of this review. A separate trial on the

issue of insanity[4] is not required by the Constitution and a state or court may validly consider its purposes better served by resolution of the issues of guilt and sanity in a single trial. See, McGautha v. California, 402 U.S. 183 (1971), and Spencer v. Texas, 385 U.S. 554 (1967).

Accordingly, it is ordered and adjudged that the Petition for Habeas Corpus is hereby denied.

DONE AND ORDERED at Miami, Florida this 27th day of August, 1973.

E. Clyde Atkins
United States District Judge

4 Under Florida procedure, the defendant is not entitled of right to a separate trial on the issue of insanity. Williams v. State, 100 Fla 814, 130 So. 456 (1930).